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8 Otto 343
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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 687.

THE UNITED STATES, PLAINTIFF,

vs.

JEREMIAH HALL.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED MAY 23, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 687.

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JEREMIAH HALL.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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1 THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

Be it remembered that at a circuit court of the United States within and for the sixth judicial circuit and southern district of Ohio, begun and held at the court-house in the city of Cincinnati on the first Tuesday of April, being the second day of that month, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States of America the one hundred and second—present, the honorable John Baxter and the honorable Philip B. Swing, judges of said court—among the proceedings there came on to be heard the case of—

THE UNITED STATES OF AMERICA
against
JEREMIAH HALL. } 1222.

On an indictment returned by the grand jury and filed in said court on the 18th day of March, A. D. 1878, being a day within the February term, A. D. 1878, of said court, and upon a demurrer filed by the defendant to the said indictment, which indictment and demurrer are in the words and figures following, to wit:

2 THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

In the circuit court of the United States, within and for the southern district of Ohio, in the sixth judicial circuit, of the term of February, in the year of our Lord one thousand eight hundred and seventy-eight.

FIRST COUNT. 4783.

The grand jurors of the United States of America, duly empaneled, sworn, and charged to inquire, within and for the said district, upon their oaths and affirmations, present that Jeremiah Hall on, to wit, the third day of October, in the year of our Lord one thousand eight hundred and seventy-six, in the county of Pickaway, in the State of Ohio, in the circuit and district aforesaid, and within the jurisdiction of this court, being then and there the duly-appointed guardian of one William Williamson, who was entitled to a pension from the government of the United States, and having then and there, as such guardian, the charge and custody of the pension-money belonging to said ward, did unlawfully and feloniously embezzle, in violation of his trust, a large sum of money, to wit, five hundred dollars, pension-money belonging to said ward, and which had theretofore been collected by him, the said Jeremiah Hall, as such guardian, from the Government of the United States, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

3 SECOND COUNT. 4783.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that Jeremiah Hall on, to wit, the third day of October, in the year of our Lord one thousand eight hundred and seventy-six, in the county of Pickaway, in the State of Ohio, in the circuit and district aforesaid, and within the jurisdiction of this court, being then and there the duly-appointed guardian of one William Will-

iamson, who was entitled to a pension from the Government of the United States, and having then and there, as such guardian, the charge and custody of the pension-money belonging to said ward, did unlawfully and fraudulently convert to his own use a large sum of money, to wit, five hundred dollars pension-money belonging to said ward and which had theretofore been collected by him, the said Jeremiah Hall, as such guardian, from the government of the United States, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

CHANNING RICHARDS,
U. S. Att'y.

(Indorsed:) 1228. United States circuit court, southern district of Ohio. The United States vs. Jeremiah Hall. Indictment for embezzlement of pension money. A true bill. Samuel S. Rickley, foreman grand jury. Filed March 18, 1878. Thos. Ambrose, clerk. Channing Richards, U. S. D. Att'y, S. D. O.

4 *Demurrer.*

THE UNITED STATES
vs.
JEREMIAH HALL. } Indictment. Embezzlement.

And now comes the defendant and demurs to the indictment of the United States exhibited against him, and for cause of demurrer thereto he says that the said indictment and the matters and things therein set forth do not contain facts sufficient to constitute and show that an offense has been committed by the said Jeremiah Hall, and this he is ready to make appear.

P. C. SMITH,
Att'y for Def't.

5 And thereupon the following questions occurred before the court, upon which and each of which the opinions of the judges were opposed, namely:

THE UNITED STATES
vs.
JEREMIAH HALL. } 1228. Indictment for embezzlement.

And now, at this April term of said court, A. D. 1878, this cause came on to be heard upon the demurrer to the said indictment herein filed by the defendant, and was argued by counsel. And thereupon there occurred, as questions to be decided by the court:

First. Whether, it appearing by said indictment that the said defendant, being the legal guardian of said ward, William Williamson, under the laws of the State of Ohio, and that the money alleged to have been embezzled and fraudulently converted to his own use by such guardian had been paid over to him by the Government of the United States as pension money belonging to said ward, this court has any jurisdiction over the said alleged offence; and has the United States any power or authority to punish said defendant for any appropriation by him of said money after its legal payment to him as such guardian?

6 2d. And if after such payment to him by the United States the said defendant did embezzle the said money and convert the same to his own use, was he not liable only to indictment therefor under the statutes of Ohio and not under the statutes of the United States?

3d. And is not the statute of the United States, section 4783 of the Revised Statutes, so far as it authorizes the indictment in this case of the said defendant, if it so does, unconstitutional, null, and void, as attempting to give the United States court jurisdiction to try and convict him for such alleged embezzlement and fraudulent conversion of said pension money, so paid to him as such legal guardian of said ward, after the United States had so parted with all right and control over said money?

Upon which questions, and each of which, the opinions of the judges were opposed.

And it is ordered by said judges that the foregoing statement of the case and points of disagreement be certified by the clerk, under the seal of this court to the Supreme Court of the United States, at its session first to be held after this date.

Dated this third day of April, A. D. 1878.

(Signed) JNO. BAXTER.
PHILIP B. SWING.

7 THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, Thomas Ambrose, clerk of the circuit court of the United States for the southern district of Ohio, do hereby certify the foregoing to be a true and correct transcript of the certificate and proceedings of said court in the case therein mentioned, remaining of record and on file in said court, and I do, in conformity with the requirement of the judges therein contained, so certify the same to the honorable Supreme Court of the United States.

In testimony whereof, I have hereto set my hand and affixed the seal of said court, this third day of April, A. D. 1878, and in the 102d year of the Independence of the United States of America.

Attest:
[SEAL.]

THOS. AMBROSE,
Clerk U. S. Cir. C't, S. D. Ohio.

(Indorsement on cover:) No. 687. The United States, plaintiffs, vs. Jeremiah Hall. S. Ohio C. C. U. S. Filed 25th May, 1878.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

UNITED STATES
v.
JEREMIAH HALL. } No. 687.

FROM UNITED STATES CIRCUIT COURT FOR OHIO, ON DIVISION OF OPINION.

PLAINTIFFS' BRIEF.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

UNITED STATES
v.
JEREMIAH HALL. } No. 687.

FROM UNITED STATES CIRCUIT COURT FOR OHIO, ON DIVISION OF OPINION.

PLAINTIFFS' BRIEF.

STATEMENT.

At the last February term of the United States circuit court, sitting in Cincinnati, an indictment was found against Jeremiah Hall, alleging (substantially) that he was, on the 3d day of October, 1876, "the duly-appointed guardian of William Williamson, who was entitled to a pension from the Government of the United States," and as such guardian had the charge and custody of the pension-money belonging to his ward; and that he (Hall) "did unlawfully and feloniously embezzle, in violation of his trust, a large sum of money," to wit, $500, pension-money belonging to his ward, and theretofore collected by Hall, as such guardian, from the government, &c., *contra formam statuti*, &c. (Record, 1, 2.)

A second count charged that Hall had fraudulently converted this money to his own use. (*Ib.*)

At the April term of court a demurrer was filed to this indictment. Thereupon, and on argument thereof, the following questions arose, upon which the judges were opposed in opinion, and therefore they are certified here:

"1st. Whether, it appearing by said indictment that the said defendant, being the legal guardian of said ward, William Williamson, under the laws of the State of Ohio, and that the money alleged to have been embezzled and fraudulently converted to his own use by such guardian had been paid over to him by the Government of the United States as pension-money belonging to said ward, this court has any jurisdiction over the said alleged offense, and has the United States any power or authority to punish said defendant for any appropriation by him of said money after its legal payment to him as such guardian.

"2d. And if, after such payment to him by the United States, the said defendant did embezzle the said money and convert the said money to his own use, was he not liable only for indictment therefor under the statutes of Ohio, and not under the statutes of the United States.

"3d. And is not the statute of the United States, section 4783 of the Revised Statutes, so far as it authorizes the indictment in this case of the said defendant, if it so does, unconstitutional, null, and void, as attempting to give the United States court jurisdiction to try and convict him for such alleged embezzlement and fraudulent conversion of said pension-money, so paid to him as such legal guardian of said ward, after the United States had so parted with all right and control over said money." (Record, pp. 2, 3, folios 5, 6.)

STATUTES.

Below will be found a summary of the legislation upon this subject; giving, first, the two sections of the Revised Statutes which were the law under which the respondent was indicted, and then the previous acts.

Congress passed an act on the 3d day of March, 1873 (c. 234, § 31), which has been twice reproduced, in slightly varying phraseology, in the revision of the statutes.

R. S., "SEC. 4783. Every guardian having the charge and custody of the pension of his ward who embezzles the same in violation of his trust, or fraudulently converts the same to his own use, shall be punished by fine not exceeding $2,000, or imprisonment at hard labor for a term not exceeding five years, or both."

R. S., "SEC. 5486. If any guardian having the charge and custody of the pension of his ward shall embezzle the same in violation of his trust, or fraudulently convert the same to his own use, he shall be punished by fine not exceeding $2,000, or imprisonment at hard labor for a term not exceeding five years, or both, at the discretion of the court."

The act of July 14, 1862, c. 166, entitled "An act to grant pensions," after specifying in its first five sections who should be pensioners and for what term they should be paid, and the amount payable, in the sixth fixed the fees to be charged by agents and attorneys for preparing and filing the papers necessary to establish a claim for pension, &c. The seventh section was as follows:

"SEC. 7. *And be it further enacted*, That any agent or attorney who shall, directly or indirectly, demand or

receive any greater compensation for his services under this act than is prescribed in the preceding section of this act, or who shall contract or agree to prosecute any claim for a pension, bounty, or other allowance under this act, on the condition that he shall receive a per centum upon, or any portion of the amount of such claim, *or who shall wrongfully withhold from a pensioner* or other claimant *the whole or any part of the pension* or claim allowed and due to such pensioner or claimant, shall be deemed guilty of a high misdemeanor, and upon conviction thereof shall for every such offense, be fined not exceeding three hundred dollars, or imprisoned at hard labor not exceeding two years, or both, according to the circumstances and aggravations of the offense." (12 Stats., 568.)

By the twelfth section of a supplementary act, approved July 4, 1864 (c. 247), the sixth and seventh sections above-named were declared repealed, and a different tariff of fees established. The thirteenth section of this act of July 4, 1864 (c. 247), repeats *in totidem verbis*, the language of the seventh section of the act of July 4, 1862, to which it is supplementary. (13 Stats., 389.)

By the act of July 8, 1870 (c. 225, § 3), it was enacted, "That hereafter no pension shall be paid to any person other than the pensioner entitled thereto, nor otherwise than according to the provisions of this act, and no warrant, power of attorney, or other paper executed or purporting to be executed by any pensioner to any claim agent, broker, or other person, shall be recognized by any agent for the payment of pensions, nor shall any

pension be paid thereon; *Provided*, That payment to persons under legal disabilities may be made to the guardians of such persons in the manner herein prescribed; *And provided further*, That pensions payable to persons in foreign countries may be made according to the provisions of existing laws." (16 Stats., 194.)

The seventh section of this act made a different provision for the fees of agents and attorneys for preparing papers; and, as no pension came into their hands, the penalty for wrongfully withholding it was omitted from the eighth section, which declared the punishment for exacting more than the statutory fees. (*Id.*, 195.)

As the act of March 3, 1873 (c. 234, § 31), is the first attempt to inflict punishment upon a guardian for embezzling or wrongfully converting to his own use any of the pension money of his ward, it is here printed in full:

"SEC. 31. That no agent or attorney or other person instrumental in prosecuting any claim for pension or bounty-land, shall demand or receive any other compensation for his services in prosecuting a claim for pension or bounty-land than such as the Commissioner of Pensions shall direct to be paid to him, not exceeding twenty-five dollars; and any agent or attorney, or any other person instrumental in prosecuting any claim for pension or bounty-land, who shall directly or indirectly contract for, demand, or receive or retain any greater compensation for his services or instrumentality in prosecuting a claim for pension or bounty-land than is hereinbefore provided, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension

or claim allowed and due such pensioner or claimant, or the land-warrant issued to any such claimant, shall be deemed guilty of a high misdemeanor, and, upon conviction thereof, shall, for every such offense, be fined not exceeding $500, or imprisoned at hard labor not exceeding two years, or both, at the discretion of the court. And if any guardian having the charge and custody of the pension of his ward, shall embezzle the same in violation of his trust, or fraudulently convert the same to his own use, he shall be punished by fine not exceeding $2,000, or imprisonment at hard labor for a term not exceeding five years, or both, at the discretion of the court." (17 Stats., 575, c. 234, § 31.)

This last clause is literally reproduced in R. S., sec. 5486, and, with only the substitution of "every" guardian who is thus guilty, instead of "if any" guardian is guilty, in R. S., sec. 4783, before printed.

BRIEF.

In that opinion, which summarizes all there is to be said about the implied powers conferred upon the Federal Government by the Constitution, the Chief Justice remarked: "But the question respecting the *extent* of the powers actually granted is perpetually arising, and will probably continue to arise as long as our system shall exist." (McCulloch *vs.* Maryland, 4 Wheat., 405.)

Congress has power to declare war (*i. e.*, "to make and carry it on" (1 Story, on the Const., § 428), and to raise and support armies. (U. S. Const., Art. 1, Sec. 8.)

That the public funds, held in trust for governmental purposes, may, incidentally to these powers, be applied to the payment of pensions and bounties (that thereby an

army may be raised and war carried on), has never been denied. The only question is as to the extent to which Congress may go in supervising the application of the money—to see that it reaches the intended beneficiaries.

I.

Congress has always treated the money paid for pensions as *sui generis*.

1. In the earliest statute, under the present Constitution (1 Stats., 245, § 6), all transfers of the claim before it became due were declared void; and a similar provision has made part of nearly all, if not quite all, the statutes since passed upon that subject.

That is, Congress has assumed to say that the pensioner had no right to dispose of it in advance, or to assign it, as he would any other contingent claim or chose in action.

2. For nearly fifty years pension money has been exempted from attachment or levy for the payment of debts by any process at law or in equity. (Act of June 7, 1832, § 3; 4 Stats., 530, and subsequent statutes.)

That is, in the hands of the pensioner's agent or attorney, this peculiar property was not subject to the claims that were enforceable against the rest of the pensioner's estate, even although the soldier and his agents were citizens of the same State, and amenable to its laws, including those relating to the collection of debts.

Such a provision was accidentally omitted from one of the pension laws passed during the late war, and the pension of a widow was attached (by what is known in Maine and Massachusetts as the "trustee process") in the hands of her agent in the latter State. In conclud-

ing the opinion of the court, Hoar, J., said: "*It is undoubtedly competent for the United States to attach such conditions as they may see fit to the grant of a pension, and to fix by law the time and manner in which the property shall finally pass to the pensioner.* But when this money was paid to the agent of the principal defendant by her consent, *and in conformity with existing provisions of law*, it became her property, and created a debt from the agent to her, over which the United States Government had no longer any control or jurisdiction. It was no longer, in the language of the statute of 1866, 'a sum of money due, or to become due, to any pensioner under the laws of the United States. It had been paid, and was received by her in the manner in which she had chosen. It could not be recalled by the government, nor could its disposal be qualified, or in any manner limited or abridged. *The statute could only apply to future payments* 'due or to become due' under the pension laws." (Kellogg *v.* Waite and Trustee, 12 Allen, 530, bottom.)

It will be noticed that this opinion concedes to the Federal Government the *power* of exemption. So in Eckert *v.* McKee (9 Bush, 356).

"It is the established policy of our government that its pensions shall be received by those to whom they are granted, and no *agreement* which has the effect to evade the law, or contravene its policy, can be sustained." (Jenkins *v.* Hooker, 19 Barb., 437; Payne *v.* Woodhull, 6 Duer, 173 to 176.)

Then any *fraudulent* attempt to contravene this policy ought certainly to be punishable.

II.

In furtherance of the design, that the pensioner should get the full benefit of the allowance made him, "the compensation of persons assisting those entitled to pensions to obtain them has, at all times, been the subject of regulation by law of Congress." (Morgan *v.* Davis, 47 Vermont, 614, bottom.)

This regulation of fees, found in the sections hereinbefore quoted, was resisted upon the precise ground taken here, that the contract was one between citizens of the same State, peculiarly within the consideration and jurisdiction of State tribunals, inasmuch as the person prosecuting the claim and obtaining the money does so as the agent of the pensioner, and not of the United States.

Yet this view never prevailed, so far as I can learn, in any Court.

In United States *v.* Fairchilds (16 Am. Law. Reg., 310, and 1 Abbott's U. S. Ct. Rep., 74), Withey, J., after reasoning out the constitutionality of the provision, observes further: "May not the government say to such employé [of the soldier], this money we pay to you for one of our soldiers, and *you must pay it over to him intact;* failing in which you make yourself liable to fine and imprisonment? True, the employé is the agent of the soldier in all that he does for him, but he must deal with the government in the exercise of that agency; and in taking such employment, to secure for the discharged soldier his bounty or pension, he knows the restrictions placed by Congress upon the compensation he can receive *and the prohibition against his retaining any portion of the funds from the soldier.* These provisions may be regarded as

the terms and conditions upon which the government consents to recognize the agency of the person employed by the soldier, and pays over the money to such agent."

In delivering his opinion in United States *v.* Marks (2 Abbott, 532–5, and 10 Int. Rev. Rec., 42), Ballard, J., approves of the reasoning and conclusion expressed in the case United States *v.* Fairchilds, above cited.

In United States *v.* Bennett (12 Blatchford, 351), Hunt, J., remarked: "While Congress permitted and authorized attorneys to receive the money due to pensioners, it was well to make the withholding of such money an offense."

III.

Nor can it make any difference that the person withholding the funds occupies the relation of guardian by appointment under State laws.

The foregoing observations and citations indicate that the fund is always considered special, and never becomes a part of the general estate of the pensioner until *he* chooses to mingle it with his other property.

The guardian holds the rest of his ward's property under State regulations; he accepts this fund by Federal appointment and designation; in taking it, he acts under (and is therefore amenable to) national legislation, as much as does a justice of the peace acting under R. S., secs. 1014, 2181, 3066, 3833, 4522, 4546, 4556, 4558, 4598, and 4606.

In Shirley *v.* Walker (31 Maine, 341), the court of that state declared, per Shepley, C. J., that an administrator held pension money under act of June 19, 1840, c. 120, § 2, in trust for the benefit of the children entitled, and not as part of the assets of the estate in his hands, and that it must be paid in full to the beneficiaries.

Upon this subject the court of New Hampshire said: "In a case like the present, the gift is strictly limited to the children, of whom the plaintiff is one, and *never rested for a moment in the executor. The statute simply designates the person who may receive the money* and pay it over to the children, provided they do not elect each to receive it for himself, or to appoint one of their number to do so. *He is distinctly precluded from mingling it with the property of the deceased, and is limited to the mere agency of receiving it and paying it over to the parties whom the law entitles to it. In this particular the statute pursues the general policy of the pension laws, in guarding, as far as possible, against undue influences, the first objects of the public bounty,* and in confining its benefits to those objects while they exist, and afterwards to those whom nature points out as their most fit successors." (Fogg *v.* Perkins, 19 N. H., 104.)

See Walton *v.* Cotton (19 Howard, 358).

IV.

If Congress has the right to segregate this fund, and distinguish it from all the residue of the pensioner's estate, as to assignability, liability for debts, &c., &c.; to limit the sum to be paid for attorney's fees in procuring it; to require an administrator or executor to pass it over intact to the pensioner's children, instead of mingling it with the general assets of the estate in his hands; if all these provisions are proper and legitimate to secure the pension to the intended beneficiaries, then, certainly, the further right must exist to enforce the due observance of proper and wholesome national legislation by suitable penalties.

"There is no doubt of the competency of Congress to

provide, by suitable penalties, for the enforcement of *all* legislation necessary or proper to the execution of powers with which it is intrusted. * * * *Any act committed with a view of evading the legislation of Congress, passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offense against the United States.* But an act committed within a State, whether for a good or a bad purpose, or whether with an honest or criminal intent, cannot be made an offense against the United States, *unless it have some relation to the execution of a power of Congress*, or to some matter within the jurisdiction of the United States." (United States *v.* Fox, 95 U. S., 672.)

But "should Congress, under the *pretext* of executing its powers, pass laws for the accomplishment of objects *not* intrusted to the government, it would become the painful duty of this tribunal to say that such an act was not the law of the land." (McCulloch *v.* Maryland, 4 Wheat., 423, bottom.)

The punishment of one who fraudulently intercepts funds, during their transmission from the public Treasury to the intended beneficiary, is as legitimate as to punish him who robs the mail of letters while going over a post-route. This is done under the constitutional authority "to establish post-offices and post-roads," even though the letters taken be only those passing from one citizen to another in the same State. He who maliciously injures a light-house, erected under the power "to regulate commerce," could be made answerable under Federal law, even if also deemed an offender against the State.

That, by State appointment, one holds a fiduciary re-

lation, which he betrays, as well as a trust confided in him by the United States, cannot avail him as a protection against punishment by either, but may make him amenable to both. (Fox *v.* Ohio, 5 Howard, 432 to 435.)

Our position may be summed up in the language quoted so many thousand times to this court: "Let the *end* be legitimate; let it be within the scope of the Constitution, and *all* means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are Constitutional." (McCulloch *v.* Maryland, 4 Wheaton, 421.)

EDWIN B. SMITH,
Assistant-Attorney General.

IN THE

SUPREME COURT UNITED STATES.

OCTOBER TERM, 1878.

UNITED STATES,

No. 687. VERSUS

JEREMIAH HALL.

BRIEF OF P. C. SMITH,

ATTORNEY FOR DEFENDANT.

UNION-HERALD Law Printing House, Circleville, Ohio.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1878.

No. 687.

UNITED STATES,

VERSUS

JEREMIAH HALL.

From Circuit Court of United States for the Southern District of Ohio.
On Division of Opinion.

FACTS.

The defendant, in accordance with the laws of the State of Ohio, was by the Probate Court of said State duly appointed and qualified as Guardian of William Williamson.

As such Guardian the laws of Ohio made it his duty to collect, receive, and invest the money and manage the property of his ward.

Article IV. Sec. 8 of the Constitution of Ohio provides that "The Probate Court shall have jurisdiction in probate and testamentary matters, the appointment of guardians, the settlement of the accounts of guardians, and for the sale of land by guardians, and such other jurisdiction as may be provided by law.

The Statutes of Ohio regulating the powers and duties of guardians are as follows, 1st S. and C., 670:

SEC. 1. The Probate Court of each county of this State shall, when necessary, appoint guardians of minors resident in such county.

SEC. 4. Any male infant over the age of 14 years, or a female infant over the age of 12 years shall have the right to select a guardian; who, if a suitable person, shall be appointed; but if such minor shall fail to select a suitable person an appointment may be made without reference to the wishes of such minor.

SEC. 5. When a guardian has been appointed for any minor, before he or she shall have attained the age of making a selection, as fixed in the last preceding section, the power of such guardian shall continue until the ward shall have arrived at the age of majority, unless such guardian shall be sooner removed for good cause, or such ward shall select another suitable guardian. After such selection is made and appointed by the court, and the person so selected is duly appointed and qualified, the power of the guardian previously appointed shall cease, and thereupon the final account of such guardian shall be filed and settled in the proper court.

SEC. 6. Before any person shall be appointed guardian of the person and estate, or of the estate only of any minor, he shall file in the court having such appointment to make, a statement of the whole estate of such minor, and the probable value thereof, and also the probable annual rents of such minor's real estate, and shall verify the same by affidavit and shall give bond, with freehold sureties, payable to the State of Ohio in double the amount of the personal estate belonging to said minor, and also the gross amount of rents that will be probably received by the guardian from the real estate of said minor during his or her minority; which bond shall be conditioned for the faithful discharge of the duties of said person as such guardian, and shall be approved by the court making such appointment, and such person shall also take an oath that he will faithfully and honestly discharge the duties devolving upon him as such guardian.

SEC. 11. Every person appointed guardian both of the person and estate of a minor, shall have the custody and tuition of his ward and the management of said ward's estate during minority, unless sooner

removed or discharged from such trust, or the guardianship shall sooner determine from any other cause specified in this act. Provided that the father of said minor, or if there be no father, the mother, if suitable persons respectively, shall have the custody of the person and the control of the education of such minor.

SEC. 14, (as amended Mar. 31, 1864, 61 O. L., 136.) The following shall be the duties of every guardian of any minor who may be appointed to have the custody and take charge of the estate of such minor to-wit.:

1. To make out and file within three months after his appointment a full inventory, verified by oath, of the real and personal estate of his ward, with the value of the same and the value of the yearly rents of the real estate; and failing so to do for thirty days after he shall have been notified of the expiration of the time by the Probate Judge, said Probate Judge shall remove him and appoint a successor.

2. To manage the estate for the best interest of his ward.

3. To render on oath to the proper court an account of the receipts and expenditures of such guardian, verified by vouchers or proof, once in every two years, or oftener upon the order of the court, made upon the motion of any person interested in said ward, or the property of said ward, for good cause shown by affidavit, failing so to do for thirty days after he shall have been notified of the expiration of the time by the Probate Judge, he shall receive no allowances for services, unless the court shall enter upon its journal that said delay was reasonable and necessary.

4. At the expiration of his trust, fully to account for and pay over to the proper person all of the estate of his ward remaining in his hands.

5. To pay all such debts due from such ward out of the estate in his hands, and collect all debts due such ward, and in case of doubtful debts to compound the same, and appear for and defend, or cause to be defended, all suits against such ward.

6. When any ward has no father or mother, or having a father or

mother and such parent is unable or fails to educate such ward, it shall be the duty of the guardian to provide for him such education as the amount of the estate may justify.

7. To loan or invest the money of his ward in a reasonable time after he receives it, and the payment of the money loaned or invested shall be secured by a mortgage on real estate of double the value of the money loaned, exclusive of buildings or other improvements, timber and minerals in or upon such real estate, or upon the purchase or pledge of the certificates of the funded debt of this State, or the bonds or certificates of the funded debt of the United States; *provided*, said guardian shall, in all cases, be held to account for all premiums realized upon coin received by him as interest or otherwise. And if said guardian fails to loan or invest the money of his ward within such reasonable time, he shall account on settlement for such money and interest thereon calculated with annual rests.

8. To obey and perform all the orders and judgments of the proper courts touching the guardianship.

SEC. 17. The Probate Court may at any time remove such guardian, he having thirty days notice thereof, for habitual drunkenness, neglect of his duties, incompetency, fraudulent conduct, removal from the county, or any other cause which in the opinion of said Court render it for the interest of the ward that such guardian be removed.

SEC. 20. It shall be the duty of the court by whom any guardian has been or may be appointed, to enforce the return at the prescribed time of all inventories and accounts, required to be filed in such court, by such guardian, and also to enforce the performance of all other duties devolving upon guardians appointed by such court either with or without complaint being first made, and thereupon to make and enter such judgments and orders as may be requisite, in any case, to promote the faithful and correct discharge of the duties of such guardians or to preserve the estate of minors for whom such guardians may have been or shall be appointed.

SEC. 22. The guardian of the person or estate, or of estate only,

shall have power when for the interest of the ward, to sell all or any part of the personal estate of the ward, and whenever necessary for the education, support, or payment of the just debts of any minor, or for the discharge of any liens on the real estate of such minor, or whenever the real estate of such minor is suffering unavoidable waste, or a better investment of the value thereof can be made, and the court shall be satisfied that a sale thereof will be for the benefit of any minor, the Probate Court, by whom a guardian of the person or estate, or of the estate only, has been appointed, may, on the application of such guardian, order the real estate of such minor or a part thereof, situate in this State, to be sold.

SEC. 30. Every guardian shall be allowed by the court settling his account, the amount of all his reasonable expenses incurred in the execution of his trust; and also such compensation for his services as the court shall deem reasonable.

SEC. 31. The settlement in the Probate Court of the accounts of the guardian shall be final between him and his ward, unless an appeal is taken therefrom to the Court of Common Pleas. * * *

SEC. 35. The Probate Judge of each county shall cause to be printed in pamphlet form such number of copies of this act as he may deem necessary, and he shall furnish to every person by him appointed guardian one of said copies, and such guardian shall pay to the Judge the actual cost thereof.

Congress provides that the pension "shall be paid to the guardian of such child or children." Secs. 4706, 4707 and 4766, Revised Statutes.

The defendant legally received the pension money of his ward; it was paid to him by the proper authorities of the United States, in pursuance of the laws of the United States. The guardian having received to money, it became his duty to invest it. The presumption is, that he performed his duty, and invested it. He did not pay it to his ward. Whether it was lost by flood, by fire, by bad investment, or by the general depreciation in the values of all property

that has swept over the country within the last few years, we do not know.

From the fact that the money has not been paid to the ward, the United States has indicted the guardian, for embezzling the money, and fraudulently converting it to his own use.

This charge is made under and by virtue of the provisions of section 4783 of the revised statutes, page 936, which reads as follows:

"Every guardian having the charge and custody of the pension money of his ward, who embezzles the same in violation of his trust, or fraudulently converts the same to his own use, shall be punished by fine not exceeding two thousand dollars, or imprisonment at hard labor for a term not exceeding five years, or both."

Section 5486 of the revised statutes is to the same effect, its language being nearly identical.

To the indictment the defendant demurred, and upon the hearing of the demurrer the following questions arose, upon which the judges were opposed in opinion, and they were certified to the Supreme Court for decision:

1st. Whether, it appearing by said indictment that the said defendant being the legal guardian of said ward, William Williamson, under the laws of the State of Ohio, and that the money alleged to have been embezzled, and fraudulently converted to his own use by such guardian, had been paid over to him by the Government of the United States as pension money belonging to said ward, this court has any jurisdiction over the said alleged offense; and has the United States any power or authority to punish said defendant, for any appropriation by him of said money, after its legal payment to him as such guardian?

2d. And if after such payment to him by the United States the said defendant did embezzle the said money and convert the same to his own use, was he not liable only to indictment therefor under the statutes of Ohio, and not under the statutes of the United States?

3d. And is not the statutes of the United States, Sec. 4783 of the

Revised Statutes, so far as it authorizes the indictment in this case of the said defendant, if it so does, unconstitutional, null and void, as attempting to give the United States Court jurisdiction to try and convict him for such alleged embezzlement and fraudulent conversion of said pension money, so paid to him as such legal guardian of said, ward, after the United States had so parted with all right and control over said money.

ARGUMENT.

I.

The objection is that the law under which this indictment was found, is municipal in its character, operating directly on the conduct of individuals and takes the place of ordinary State legislation, and that there is no constitutional authority for such an act, inasmuch as the State laws furnish adequate remedy for the alleged wrong committed.

"The Government of the United States is one of delegated powers. Its authority is defined and limited by the Constitution.

All powers not granted to it by that instrument are reserved to the States, or the people. No rights can be acquired under the Constitution or laws of the United States, except such as the Government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States."

U. S. vs. Cruikshank, 92d U. S. Rep., 551.
X Amend. to Const.
See Farmer's Nat. Bank vs. Dearing, 91st U. S. Rep., 34.

"When any rights and privileges are secured in the Constitution of the United States only by a declaration that the State or the United States shall not violate or abridge them, it is at once understood that they are not created or conferred by the Constitution, but that the Constitution only guarantees that they shall not be impaired by the State, or the United States, as the case may be. The fulfillment

of this guaranty by the United States is the only duty with which that Government is charged. The affirmative enforcement of the rights and privileges themselves, unless something more is expressed, does not devolve upon it, but belongs to the State government as a part of its residuary sovereignty. For example, when it declared that no State shall deprive any person of life, liberty or property without due process of law. This declaration is not intended as a guaranty against the commission of murder, false imprisonment, robbery, or any other crime committed by individual malefactors, so as to give Congress the power to pass laws for the punishment of such crimes, in the several States generally. It is a constitutional security against arbitrary and unjust legislation, by which a man may be proceeded against in a summary manner, and arbitrarily arrested and condemned without the benefit of those time-honored forms of proceedings in open court and trial by jury, which is the clear right of every freeman, both in the parent country and in this. It is a guaranty against the exertion of arbitrary and tyranical power on the part of the government and legislation of the State, not a guaranty against the commission of individual offenses, and the power of Congress, whether implied or expressed to legislate for the enforcement of such a guaranty does not extend to the passage of laws for the suppression of ordinary crime within the States.

This would be to clothe Congress with power to pass laws for the general preservation of social order in every State. The enforcement of the guaranty does not require, or authorize Congress to perform the duty, which the guaranty itself supposes it to be the duty of the State to perform, and which it requires the State to perform."

U. States vs. Cruikshank, 13 Am. Law Reg., 630, 634-5.
See same case, 92d U. S. Rep., 542.

"All ordinary murders, robberies, assaults, thefts, and offenses whatsoever are cognizable only in the State courts."

Bradley Justice in the U. S. vs. Cruikshank, 13th Am. L. Reg., 637.

"It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State than it would be to punish for false imprisonment or murder itself."

U. S. vs Cruikshank, 92 U. S. Rep., 653-4.
U. S. vs. DeWitt, 9 Wall., 41.
Slaughter House Cases, 16 Wall., 36, 77, 82.

"The punishment of a cheat or a misdemeanor practiced within the State, and against those whom she is bound to protect, is peculiarly and appropriately within her functions and duties, and it is difficult to imagine an interference with those duties and functions which would be regular or justifiable."

Fox vs. Ohio, 5 Howard, 410, 434.

"An act committed within a State, whether for a good or bad purpurpose, or whether with an honest or criminal intent, cannot be made an offense against the United States, unless it prove some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. Any act not having any such relation is one in respect to which the State can alone legislate."

U. S. vs. Fox, 95 U. S. Rep., 672.

The money was properly paid to the guardian; when received by him, it became his duty to manage it for the best interest of his ward; whether he managed it properly or improperly, whether he used it for the benefit of his ward, or used it for his own purposes, can in no sense affect the rights or interests of the general government, or impede in any way, the execution of any of its powers.

II.

This case is not a very important one in and of itself. Jeremiah Hall is an humble individual, but he is a citizen of the State of Ohio, and an American citizen, and he represents all other citizens of the several States of the Union, and therefore this case is mighty in its

far reaching consequences. If the principle is once admitted that Congress has the power to invade the State, and enact laws for the regulation and government of the citizens of the State, and to punish them, for violation of those laws, then Congress may assume all the police regulations of the several States, and thus work their entire destruction.

It is admitted that the validity of every law is to be presumed—that the defendant must satisfy the court, that Congress has no power to enact the law under which the indictment in this case was found.

The moment the government parts with the money, to a citizen of a State who is legally entitled to receive it, that moment the power of the government over the money ceases.

The money becomes the property of the ward, subject to be held and controlled and managed by the guardian, subject only to the supervision of the Probate Court, appointing such guardian.

This court in the case of U. S. vs. Fox, 94 U. S. Rep., 320, held that "The title and modes of disposition of real property within the State whether *inter vivos*, or testamentary, are not matters placed under the control of Federal authority." Much more then, is the disposition and management of *personal property*, which is always governed by the laws of the domicil of the owner, under the control of State authority.

The pension having been paid by the department to the guardian, from that moment it ceases to be under the control of the department or the power and authority of the general government.

"A letter, packet, or other valuable thing, having been committed to the Postoffice Department for carriage and delivery, if once parted with by the postmaster to the person authorized to receive it, from that moment, ceases alike to be under the control of the department and the power and authority of the general government. The sanction by the Federal Courts of the contrary doctrine would be dangerous in its tendencies and subversive of reserve state authority. * * When the functions of the department are exhausted by the proper delivery of mail matter (once placed in its charge)

such mail matter is then beyond the reach and authority of any legislation of Congress."

U. S. vs. Sanders, 6th McLain, 601.

This case is strictly in point.

To the same effect is the case of Kellogg vs. Waite, 12 Allen, 529, cited by the Assistant Attorney General in his printed brief. In that case the court, on page 530, say:

"It is undoubtedly competent for the United States to attach such conditions as they may see fit to the grant of a pension, and to fix by law the time and manner in which the property shall finally pass to the pensioner. But when this money was paid to the agent of the principal defendant, by her consent, and in conformity with the existing provisions of law, it became her property, and created a debt from the agent to her, over which the U. S. government had no longer any control or jurisdiction. It had been paid, and was received by her in the manner she had chosen. It could not be recalled by the government, nor could its disposal be qualified or in any manner limited or abridged."

"An errand boy who is authorized to call for and receive his employer's letter arriving by mail, and who, after receiving such a letter containing an article of value, embezzles it, cannot be convicted under section 22, of the act of March 3d, 1825, of taking from the mail, *and* embezzling the letter, because his taking was lawful."

United States vs. Driscoll, 1st Lowell, 303.

Justice Lowell in deciding this case uses the following language, page 304: "When such a delivery (i. e., a delivery of the letter to the person entitled to receive the same, or his authorized agent) has been made, the government is discharged of further responsibility, and its functions cease to operate upon the letter. If the clerk or servant of the owner betrays his trust, that is a matter to be looked into by the authority of the State, whose laws regulate such agencies."

III.

"The people of the United States resident within any State are subject to two governments: one State and the other National; but there need be no conflict between the two."

"*The powers which one possesses, the other does not.*"

U. S. vs. Cruikshank, Supra, 550.

If Congress can empower the general government to indict a guardian who is appointed under the law of a State, and who, both by the law of Congress and of the State which made the appointment, is authorized to receive the pension money of his ward, for embezzling such money thus rightly received by the guardian, then Congress has the power to prescribe the fees that the guardian shall receive for handling said pension money. Then Congress has the power to prescribe the manner of investing such money, and the penalty which the guardian shall suffer for any departure from the mode of investing said fund as prescribed by Congress. Then Congress has the power to provide that said money shall forever be exempt from taxation by State authority. The power that authorizes an indictment against a guardian for embezzling the pension money of his ward, after the same has been paid to such guardian, will sustain an indictment for embezzling "greenbacks," "silver dollars," or "gold eagles" after they have been put into circulation. The one is money, *paid out*, by the government to one retired from the service of the government or to his widow and children for past services. The others, are the money of the government *paid* to the employees of the government, from time to time, for services being rendered at the time of the payment, or paid as the interest on the government indebtedness. That indebtedness held and controlled to a very large extent by guardians. In neither event has Congress the power to follow the money, and after it comes into the hands of the parties entitled to receive the same, prescribe the manner of its investment. If the power exists at all, it exists for every purpose, and would authorize an indictment against a citizen of a State for a larceny within a

State, of bank bills issued by a National bank. If it exists at all, it exists during the entire minority of the ward, and the government can, at any time, recall the money from the guardian, or order him to pay it to some other person for the use of his ward, and upon his failure to comply with such order, the government would have a right of action against him for the fund. On the other hand, if the guardian pays the money to the ward during his minority, he pays it at his peril.

IV.

This court, in the case of the City of New York vs. Miln, 11th Pet., 102, say: "A State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, when that jurisdiction is not surrendered, or restrained by the Constitution of the United States."

"It is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends, when the power over the particular subject, or the manner of its exercise are not surrendered or restrained by the Constitution of the United States."

All those powers which relate to merely municipal legislation, or which may more properly be called internal police, are not surrendered or restrained, and, consequently, in relation to these, the authority of a State is complete, unqualified, and conclusive."

The powers necessary to the regulation of the police, morals, health, internal commerce, and general prosperity of the community are subject to State legislation, and the objects to be accomplished by these are to be reached and effected by any appropriate means

which do not interfere with the exercise of any of the powers vested in the general government.

Nelson vs. People, 3d Ill., 390.
Comm vs. Kimball, 41 Mass., 359.
Prigg vs. Comm, 16 Pet., 539.
Willard vs People, 5 Ill., 461.
Munn vs. Illinois, 94 U. S. Rep., 113.
Henderson vs. Mayor, 92 U. S. R., 259.

The police power of a State is one of the different means used by sovereignty to accomplish that great object to the good of the State.

Passenger Cases, 7 Howard, 283.

V.

The case of Morgan vs. Davis, 47 Vt., 614, cited by the Assistant Attorney General, is a case where a claim agent who had obtained a pension, for a pensioner, and had brought an action to recover a larger fee for his services than was allowed by act of Congress, together with the expenditures made by him in the prosecution of said claim. The court held that he might recover for the necessary expenditures made by him, but that he could not recover any larger sum by way of a fee than was fixed by the act of Congress for such services.

The case of Payne vs. Woodhull, 6 Duer, 173, is a case where a widow, a pensioner, had assigned her pension certificate before the pension money was paid, and the court held that such assignment was, under the act of Congress, void. To the same effect is the case of Jenkins vs. Hooker 19 Barb., 435. And so in the case of Eckert vs. McKee, 9th Bush., 356. The plaintiffs, Eckert & Co., sought, by proceeding in attachment, to stop the pension money coming to Mrs. McKee before it reached her hands, and appropriate it to the satisfaction of a claim held by plaintiffs against the pensioner; this the court held could not be done.

The case of U. S. vs. Marks, 2d Abbott, 532, is also a case where an attorney had refused to pay to the pensioner a part of the pension money by him received from the government for the pensioner. The defendant claimed that he had a contract by which he was entitled to a larger fee than the one allowed by act of Congress. The court held the law valid and cited and relied on the case of U. S. vs. Fairchilds, in 7 Am. Law Reg., 310; U. S. vs Bennett, 12th Blatchford, 345, is to the same effect.

In none of these cases had the pension money reached the hands of the pensioner. In all of them, the government exercised the same authority that courts have always exercised over attorneys that practice before them, i. e., see that the money collected reaches the party to whom it belongs.

Whenever an attorney is employed by a party to collect money, or to attened to any business in court, he becomes the agent of the party employing him, yet, at the same time, he is so far the officer of the court, that courts will invariably see that he performs his duty to his client and pays over the money collected.

The principles underlying the cases cited by the Assistant Attorney General goes no farther.

The only question before the Court in the case of Walton vs. Cotton, 19th Howard, 358, was, whether the term "children," as used in the pension laws, enacted by Congress, included grandchildren. The court held that grandchildren were included.

The case of Foggy vs. Perkins, 19th N. H., 104, is a case where a testatrix had died leaving money in the hands of the "Pension Agent;" under the control of the government, and in pursuance of the act of Congress, it was paid to the executor for the benefit of the heir. The government, at the time of the death of the testatrix, had not parted with the money.

Shirly vs. Walker, 31, Maine, 541, is to the same effect.

In these cases the money was still in the custody of, and under the control of the government, and Congress has rightfully said, that its

bounty shall go to its beneficiary or his heirs. But in no case has it been said, and no where (except in the acts in controversy) has it been claimed, that after the pension money had been paid by the government, to the party rightfully entitled to receive it, it did not at once become a part of the estate of the pensioner, and liable for his debts.

All the cases cited by the Assistant Attorney General are cases where the government has prescribed the duties of agents in regard to pension money in its transmission from the government to the pensioner.

In the case at bar the goverment has gone farther, and has sought to control the appointee of a State Court in the management of the fund, after the appointee of the State Court has rightfully received the money.

In the cases cited the government has prescribed rules for the transmission of the fund to the object of its bounty. In this case, the government is seeking to control, not the fund itself, but the guardian; a citizen of a State, in the management of the fund, that belongs to his ward, who is also a citizen of a State, both owing allegience to the State, and both being subject to the supervision of the Probate Court of the State.

The Assistant Attorney General cites the case of Fox vs. Ohio, 5 Howard, 432 to show that a person may be amenable to both the State and the United States governments for the same offense. But a careful examination of that case shows that the familiar doctrine, that a person cannot be amenable to both governments for the same offense was clearly recognized. He may be amenable to both for the same act, but not for the same offense, as in the case of Fox vs. Ohio. Fox had been indicted under the statute of Ohio for passing counterfeit coin, and the court, held that he might be amenable to the United States, because it discredited the coin of the United States; and he might be amenable to the State of Ohio, because of the fraud upon him, to whom the coin had been passed.

U. S. vs. Marigold, 9th Howard, 568.
Moore vs. Illinois, 14 Ib., 13.

The cases cited by the Assistant Attorney General all involve questions growing out of the conduct of agents, or those acting as agents, in the transmission of the funds of the government to the objects of its bounty; while this case involves the conduct of a guardian, the recipient of the bounty itself, after it has been received by him, and in the examination of the questions arising in this case, we must not loose sight of the distinction between the two.

An agent is one who is appointed by his principal, to act for the person appointing him. A guardian is one, who is appointed by the court, to have the care, custody and control of both the person and property of his ward. An agent may be discharged by his principal at any time, and for any, or without any cause. A guardian cannot be discharged by his ward; he can only be removed by the court appointing him, for cause; or by efflux of time. An agent must follow strictly the instructions of his principal. A guardian's duties are fixed by law, and it often becomes his duty to act contrary to the wishes and instructions of his ward.

An agent cannot bring an action at law, or a suit in chancery, unless expressly authorized so to do. A guardian may bring an action in his own name for an injury to any property of his ward in his actual possession, or to which he has the right of possession. An agent stands in the place of his principal. A guardian is, in a certain sense, an officer of the court appointing him, and subject to its control, and being thus the officer of a State Court, and subject to its control and answerable to it, and to the laws of the State appointing him, for any dereliction of his duty, the general government has no power, or authority, to interfere with, or control his conduct.

Story's Eq. J., 1338.
Wellesley vs. Duke of Beaufort, 2d Russ., 20, 21.

The demurrer to the indictment should be sustained.

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